Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

ERIC KARL SPANGENBERG, EDWARD J. NILAND, JOHN B. GUNN AND EMEKA NCHEKWUBE, INDIVIDUALS, ***Petitioners,***

V.

CITY OF SAN JOSE, CALIFORNIA, A MUNICIPAL CORPORATION AND CALIFORNIA AGRICULTURE AND FOREST PRODUCTS CORPORATION, IN THE CAPACITY OF JUDGMENT DEBTOR, ***Respondents.***

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW.

1. Does bankruptcy law toll the statute of limitations for claims for Relief which are prevented by the Automatic Stay in bankruptcy? 11 U.S.C. §108

2. Can claims for just compensation be brought directly under the Constitution of the United States, or must they be brought under the Civil Rights Act? 42 U.S. §1983.

3. Has the Equal Protection Clause of the Fourteenth Amendment been violated when a city takes property from a party in bankruptcy, while creditors in bankruptcy are prevented from filing actions to prevent the taking?

4. Does the destruction of a Lien constitute a taking of property in violation of the Fifth and Fourteenth Amendments to the Constitution and the Civil Rights Act, 42 U.S.C. §1983, requiring just compensation?.

5. Is the statute of limitations for claims under the U.S. Constitution, or the Civil Rights Act governed by state or federal law?

PARTIES TO THE PROCEEDING

PETITIONERS

Petitioners are Eric Karl Spangenberg, Edward J. Niland, John B. Gunn and Emeka Nchekwube, Individuals,

RESPONDENTS

City of San Jose, California, a Municipal Corporation and California Agriculture and Forest Products Corporation, in the capacity of Judgment Debtor. Note: California Agriculture and Forest Products Corporation, is believed to be a defunct corporation, and is named herein as a Judgment Debtor pursuant to California Code of Civil Procedure, Section 708.210, et seq. An Order to serve California Agriculture and Forest Products Corporation, by serving the Secretary of State of the State of California was requested in the District Court, but never acted on by the court. [District Court Civil Docket, following #3, 10/12/2000]

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Petitioners respectfully petition for a Writ of Certiorari to review the decision of the United States Court of Appeal for the Ninth Circuit in this case.

OPINIONS BELOW

On April 25, 2003, the Ninth Circuit issued its Opinion in an unpublished Memorandum, entitled EDWARD J. NILAND; JOHN B. GUNN; EMEKA NCHEKWUBE; ERIC KARL SPANGENBERG v. CITY OF SAN JOSE, California, a municipal corporation; CALIFORNIA AGRICULTURE AND FOREST PRODUCTS CORP, [sic][1] Case No. 02-15352. [See Appendix A and B]

JURISDICTION

The original opinion of the Ninth Circuit was filed April 25, 2003. Petitioners' timely petition for rehearing was denied June 3, 2003.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

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[1] Note the case in the District Court was entitled ERIC KARL SPANGENBERG, EDWARD J. NILAND, JOHN B. GUNN AND EMEKA NCHEKWUBE, Individuals, v. CITY OF SAN JOSE, CALIFORNIA, A MUNICIPAL CORPORATION AND CALIFORNIA AGRICULTURE AND FOREST PRODUCTS CORPORATION, IN THE CAPACITY OF JUDGMENT DEBTOR, United States District Court, Northern District of California, San Jose Division, Case # C-00-20902 RMW [See Appendix C and D.]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

1. U.S. Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in and criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. U. S. Constitution, Amendment XIV.

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
... [For compete text of Amendment XIV, See Appendix.]

3. Civil Rights Act. 42 U.S.C. § 1983

42 U.S.C. Sec. 1983

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. 11 U.S.C. §108. Extension of time [See Appendix]

5. California Constitution, Article 1, §19. Eminent Domain; just compensation; possession. [See Appendix]

6. C.C.P.[2] §§ 318, 319, 321 & 322.[See Appendix]

7. C.C.P. § 338. Three Years. [See Appendix]

8. Creditor Lawsuits. C.C.P. §708.210-§708.290. [See Appendix]

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[2]C.C.P. is an abbreviation for California Code of Civil Procedures.

STATEMENT OF THE CASE

On December 11, 1985, defendant California Agriculture and Forest Products Corporation (Hereinafter referred to as "CalAg") acquired approximately 36 acres of vacant land in the City of San Jose, California, (Hereinafter referred to as the "Lower Suncrest Property") located on both sides of Suncrest Avenue, westerly and adjacent to the Santa Clara Valley Water District water distribution facility, commonly referred to as Assessor Parcel Numbers APN 595-04-033, 063 & 067. On or about August 15, 1988, CalAg entered into an Option and Purchase Agreement with Davidon Homes, Davidon Corporation and Donald Chaiken (Hereinafter referred to collectively as "Davidon"), whereby Davidon optioned the right to purchase from CalAg, the Lower Suncrest Property, along with additional adjacent land that CalAg owned referred to herein as the Upper Property. [See CFR ¶11 & DECEKS, Exhibit "B"][3] After CalAg and Davidon entered into the Option and Purchase Agreement referenced above, CalAg in cooperation with Davidon immediately proceeded to create designs for the development of the Upper and Lower Suncrest Property, and submitted these project designs to the City of San Jose for approval. [See CFR ¶12 & DECEKS, Exhibits C&D]. Disputes arose between CalAg and Davidon, resulting in litigation, and a court trial. A Judgement, was entered on January 9, 1992, in

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[3] NOTE:"CFR" is an abbreviation for Complaint for Relief ¶ ___. [District Court Civil Docket #1] DECEKS, EXHIBIT " ___", is an abbreviation for DECLARATION OF ERIC KARL SPANGENBERG IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT. [District Court Civil Docket #s 34-36]

which among other things, determined that ... 2. Title to the lower property is vested in California Agriculture and Forest Products Corp. [sic] free and clear of all claims, demands and rights of Davidon Homes and Davidon Corporation, and anyone claiming under them or either of them. ...". [The real property referred to in the judgment quoted above as the "Lower Property", is the same real property, referred to above as the "Lower Suncrest Property".] In other litigation between CalAg and Davidon the court determined among other things, that CalAg.....was the alter egos of James Macredes. ..." [See CFR ¶34 & DECEKS, Exhibit F]

On August 16,1994, The City of San Jose enacted a new General Plan commonly referred to as 2020 General Plan, which classified the Lower Suncrest Property as "Urban Hillside", reducing the potential development from 72 residential units down to seven units. [See DECEKS, Exhibit G] On August 23, 1994, the City of San Jose made amendments to its Geologic Hazard Ordinance, Chapter 17.10 of the San Jose Municipal Code, creating a "Special Geologic Hazard Study Area". This Geologic Ordinance includes the Lower Suncrest Property, and requires Geologic Clearance before the development of the Lower Suncrest Property. Davidon, whose real property interests were affected, challenged the actions of the City of San Jose, by filing multiple actions. One of these actions resulted in a published opinion Davidon Homes v. City of San Jose, 54 Cal.App.4th 106, 62 Cal.Rptr 2d 612 (1997). Apparently in response to this decision, the City San Jose, enacted an interim Geologic Ordinance on June 10, 1997. [See CFR ¶ 15 & DECEKS, Exhibit M]. This interim Geologic Ordinance was followed by a sequence of ever more restrictive Geologic Ordinances. [See DECLARATION OF MARGO LASKOWSKA IN REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT CITY OF SAN JOSE'S

MOTION FOR SUMMARY JUDGMENT, District Court Civil Docket # 45]

Prior to March 14, 1995, CalAg became indebted to the Petitioners ERIC KARL SPANGENBERG, EDWARD J. NILAND, JOHN B. GUNN and EMEKA NCHEKWUBE, in an amount which at the time of filing this complaint, including interest, is collectively in excess of Two Million Dollars. ($2,000,000.00). [See CFR ¶16,26,32-36 & DECEKS, Exhibit N]

On March 14, 1995, CalAg filed for protection under Chapter Eleven of the bankruptcy laws of the United States, entitled IN RE CALIFORNIA AGRICULTURE AND FOREST PRODUCTS CORPORATION, United States Bankruptcy Court, Northern District of California, San Jose Division, Case #95-51564 MM. At time of filing of the Petition, the primary assets of the bankruptcy estate were a single family house within the City of San Jose, and the Lower Suncrest Property. In the Petition, the Lower Suncrest Property was listed as having a value of Ten Million Dollars ($10,000,000.00).[4] [See CFR ¶17 & DECEKS, Exhibit O&P]

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[4]Note: Ten Million Dollars was the value that CalAg put on the property in filing its petition for bankruptcy in 1995. [DECEKS, Exhibit "O", See also DECEKS, Exhibit" Q" 11/7/1996. Judgment in complaint in adversary proceeding in bankruptcy, where Judge Sullivan in his Findings of Fact and Conclusions of Law, page 1, line 21-22, where the value was stated to be "approximately $10,000,000"] The Assessed valve in 1997 was for APN # 595-04-67 was $693,398, APN# 595-04-33 was $916,697 and APN #595-04-63 was 1,375,048.(A total of $2,935,143. Ed. Note) [DECEKS, Exhibit V, Page 20, line 19 through Page 21, line 15]

Petitioners herein, ERIC KARL SPANGENBERG, EDWARD J. NILAND, JOHN B. GUNN and EMEKA NCHEKWUBE, duly filed Creditor claims in the above bankruptcy. [See CFR ¶17 & DECEKS, Exhibit N] The CalAg bankruptcy was converted from a Chapter Eleven Case to a Chapter Seven Case. [See CFR ¶18-22 & DECEKS, Exhibit P] The single family house was sold in foreclosure, creating no monetary benefit for the bankruptcy estate. The Chapter Seven Trustee in the CalAg bankruptcy sought to sell the Lower Suncrest Property without success. Creditor Davidon sought and received an order for relief from stay, and on October 21, 1998, held a Sheriff's Sale, claiming the right to do so. At the time of sale, there were county real estate taxes due in the approximate amount of Seven Hundred Thousand Dollars ($700,000.00). At said sale, Davidon purported to purchased the Lower Suncrest Property for a Credit bid of One Thousand Dollars ($1,000.00). [See CFR ¶23 & DECEKS, Exhibit S]

On November 1, 1999, pursuant to an application by the Chapter Seven Trustee, the federal bankruptcy court issued an order entitled ORDER APPROVING SALE OF ESTATE'S INTEREST OF CLAIM AGAINST CITY OF SAN JOSE BY DEFAULT. On March 29, 2000, pursuant to this Order, the Chapter Seven Trustee Mohamed Poonja assigned "...the estate's interest in any and all claims the estate may have against the City of San Jose to the following creditors in this case: Eric K. Spangenberg, John T. Dawson, Edward J. Niland, John B. Gunn and Emeka Nchekwube." [See DECEKS, Exhibit T]

On May 4, 2000, pursuant to an application by the Chapter Seven Trustee, the federal bankruptcy court issued an order relieving the Chapter Seven Trustee of his obligations in the CalAg bankruptcy, and allowing him to wind up his affairs. On July 31, 2000, the bankruptcy case

was closed and a final decree was issued. [See CFR ¶27 & DECEKS, Exhibit P]

This action was filed August 28, 2000, in the United States District Court, Northern District of California, case number CV-00-20902 RMW. On January 30, 2002, the District Court issued an order entitled ORDER DISMISSING "ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND UNDER THE STATUTE OF LIMITATIONS, and a JUDGMENT which were filed with the Clerk of the Court. On January 31, 2002, the Judgment was entered. On February 20, 2002, a NOTICE OF APPEAL was filed by the Petitioners. This action was docketed with the United States Court of Appeals for the Ninth Circuit as Case #02-15352. The matter being fully briefed, was heard at Oral Argument April 7, 2003. A Memorandum decision of the Ninth Circuit was filed April 25, 2003. Petitioners timely filed a petition for rehearing which was denied June 3, 2003.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT HAS DECIDED SEVERAL IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

A. INTRODUCTION.

Petitioners have advanced two basic theories for recovery in this litigation. First, the Petitioners Spangenberg, Niland, Gunn and Nchekwube, are Creditors of CalAg. When a petition was filed by CalAg March 14, 1995, an

automatic stay in bankruptcy was provided for by 11 U.S.C. §362, and the Petitioners were prevented from perfecting Judgments against CalAg up until the termination of the bankruptcy on July 31, 2000. In the case of Petitioners, Spangenberg, Gunn and Niland, they hold judgments against James J. Macredes, and contend that by virtue of a preexisting Judgment which held that the defendant CalAg was the alter ego of James J. Macredes, they claim that now that the bankruptcy has been dismissed and they are unfettered by an automatic stay in bankruptcy, that they have a Judgment against defendant CalAg, by the doctrine of Res Judicata, and/or Judgment estoppel, and/or collateral estoppel or general equitable principles. In the case of Petitioner Nchekwube, he was also prevented from perfecting a judgment against CalAg because of the existence of the ongoing bankruptcy. In the alternative, since the Petitioners are assignees of the Chapter 7 Trustee in bankruptcy, Petitioners can simply stipulate to a Confession of Judgment modifying or creating Judgments to include CalAg. Had CalAg not filed for bankruptcy, as Judgment Creditors all the Petitioners could have filed a Creditor's lawsuit, pursuant to the provisions of C.C.P. § 708.210, et seq., which allows for creditor lawsuits against third parties, who are indebted to the Judgment Debtor. In this case petitioners contend that the Respondent City of San Jose, is indebted to CalAg by virtue of their actions which Petitioners characterize as Inverse Condemnation. See also Certified Grocers of California, Ltd. v. San Gabriel Valley Bank., 150 Cal.App.3d 281; 197 Cal.Rptr. 710 (1983)

The Petitioners' second theory for relief, is as the

Assignee of the Chapter Seven Trustee[5] in bankruptcy, and it is the contention of the Petitioners that by this assignment, Petitioners are entitled to seek recovery in the exact same manner as CalAg would be entitled to do. This is because the Petitioners purchased the rights of the Trustee in bankruptcy to pursue claims against the City of San Jose, the Petitioners are effectively standing in the shoes of the Trustee. These claims under this theory can be analyzed by determining what recovery CalAg is entitled to on account of the actions of the City of San Jose.

B. TAKING ACTIONS BY THE DEFENDANT CITY OF SAN JOSE.

On August 16, 1994, the City of San Jose enacted General Plan 2020, wherein among other things the Lower Suncrest Property was down zoned from 2 units per acre to .2 units per acre. Note that because the Lower Suncrest Property is 36 + acres, this reduces the number of allowable residential units to go from 72 to 7. The evidence available shows that prior to this downzoning, the Lower Suncrest Property had a value of no less than Ten Million Dollars.[6] Although this down zoning effectively reduced the value of the Lower Suncrest Property there was still arguably a residual value in the seven five acre building sites which remained. This down zoning effectively took property interest from the rightful property owner CalAg and bestowed the benefit on the community as a whole. In

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[5] See DECEKS, Exhibit T, for the relevant bankruptcy papers relating to the assignment.

[6] See Footnote 4.

addition August 23, 1994, the Lower Suncrest Property which had previously been subjected to a building moratorium was designated within a Geologic Study Zone, which for all intents and purposes has persisted to the present. [See DECEKS, Exhibits I, J, K, L & M]. On October 21, 1998, Davidon bought the subject site at a Sheriff's Sale for a credit bid of one thousand dollars subject to county real estate taxes [DECEKS, Exhibit S], notwithstanding that Davidon, had represented to the Bankruptcy Court that the property was worth at most $385,000. [See DECEKS, Exhibit R] This same subject property was subsequently sold at tax sale for $90,000.00. [DECEKS, Exhibit W]. Considering this property was worth at or about Ten Million Dollars, in 1994, the property was worth virtually nothing by 1998, and for all intents and purposes nothing by 2001. In view of the soaring real estate prices in the area in recent times, where buildable land can sell for as much as One Million Dollars an acre, this destruction in value is staggering.[7]

Petitioners contend that defendant City has completely destroyed the value of the Lower Suncrest Property by their actions, and that this is a taking without just compensation properly addressed by a lawsuit in Inverse Compensation. The Causes of Action brought by Petitioners seek relief under 42 U.S.C. §1983, Fifth Amendment, Fourteenth Amendment and a taking under the Article 1, Section 19 of the California Constitution.

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[7]Petitioners request that the court take judicial notice pursuant to Federal Rules of Evidence §201 of the current real estate market in the San Jose Area, as portrayed in the San Jose Mercury News Article, "Land Prices' Vicious Cycle", dated February 21, 2000. [See DECEKS, Exhibit X]

The original down zoning in August of 1994, resulted in a significant reduction in the value of the Lower Suncrest Property. This original reduction in value was followed by further reductions caused by a moratorium and a series of Geologic Ordinances, that resulted in additional reduction in the value of the Lower Suncrest Property. If that wasn't enough, the City Geologist and presumably others within the City required such impossible conditions for obtaining permission to develop the Lower Suncrest Property, that 36 acres of otherwise developable property was reduced to effectively zero value. Assuming for sake of argument, that after the original downzoning August 16, 1994, the property had a value of $500,000 per lot the subject property would still have been worth approximately 3.5 Million (ie. Seven five acre lots at $500,000 per lot) in June of 1998. Instead the property went for a credit bid of one thousand dollars, subject to approximately $700,000.00 in back taxes at a Sheriff's Sale on October 21, 1998. According to an Appraisal submitted into the CalAg bankruptcy by Davidon, in Support of their Motion for Relief from Automatic Stay, set for a hearing on April 30, 1997, the Lower Suncrest Property was worth only $385,000.00 as of March 11, 1997. [See DECEKS, Exhibit R] As such, the credit bid by Davidon Homes, for one thousand Dollars can be said to reflect no equity in the property at that time, and a value not in excess of the appraised value of $385,000. After holding the Lower Suncrest Property for two and one half years, Davidon Homes, having failed to pay the taxes on Lower Suncrest Property allowed the property to go to Tax Sale. This Tax Sale was held on May 2, 2001, at which time, the starting minimum bid was for $974,200.00, which was ultimately lowered because there had been no bids, and was finally sold by the County of Santa Clara Tax Collector for

$90,000.[DECEKS, Exhibit W][8] Considering the original value of Ten Million dollars, or even some reasonable interim value after the original downzoning August 16, 1994, a sale of $90,000.00 is for all intents and purposes effectively zero value. According to the Purchase Agreement between CalAg and Davidon, the Option agreement for the Lower [Suncrest] Property called for option payments of 2% every three months. For real property worth Ten Million Dollars, this would mean that Option Payments would be Two Hundred Thousand Dollars every three months under the terms of this agreement. [See DECEKS, Exhibit B, paragraph 4, page 3 and paragraph 6, page 6] For this reason, it is appropriate to point out that the amount paid for the Lower Suncrest Property at the Tax Sale May 2, 2001, was a nominal amount and that it should be considered that the property had zero value at that time.[9]

This is not a standard downzoning, this is pure and simple a taking of property without just compensation. This case fits squarely with the criteria of Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992). See also Palazzolo v. Rhode Island , et al., 533 U.S. 606 (2001)

II. THE NINTH CIRCUIT HAS DECIDED IMPORTANT FEDERAL QUESTIONS WHICH CONFLICTS WITH OTHER DECISIONS OF THE NINTH CIRCUIT,

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[8]See Specifically Page 13, line 7, et seq. and Page 17, Lines 16-19[See also Deposition Exhibits J & K therein]

[9] Note: The Tax Sale purchase price of $90,000.00 on May 2, 2001, is 0.9%, which is less than 1% of Ten Million Dollars

AND CONFLICTS IN PRINCIPAL, IF NOT DIRECTLY, WITH RELEVANT DECISIONS OF THIS COURT.

The Petitioners contend that the decision of the Ninth Circuit is flawed in several different respects. First the decision of the panel conflicts with at least three previous decisions of the Ninth Circuit[10] in interpreting the tolling provisions of the provisions of the Bankruptcy Code, 11 U.S.C. §108, and the "due process" provisions of the Fifth and Fourteen Amendments to the United States Constitution.

As claimants of CalAg, the Petitioners were prevented from perfecting their claims against CalAg once the CalAg bankruptcy was filed March 14, 1995, up until July 31, 2000, when the CalAg bankruptcy was finalized. Had there been no CalAg bankruptcy filed, the Petitioners Spangenberg, Gunn and Niland could have brought an action against the City of San Jose as creditors as early as September, 1995[11], and plaintiff Nchekwube, could have filed at or about the same time. Under bankruptcy law, there are certain provisions for the tolling of claims which could have been brought by the debtor (In this case CalAg). 11 U.S.C. §108.[12] Since CalAg filed for bankruptcy on March 14, 1995, the trustee would have two years or until March 14,

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[10]In In re Hunters Run Ltd. Partnership, 875 F.2d 1425 (9th Cir. 1989) In In re Spiros, 221 F. 3d 1079 (9th Cir. 2000) citing In re Hunters Run Ltd. Partnership, supra, In re Southern California Plastics, 165 F.3d 1243 (9th Cir. 1999).

[11]See CFR, pages 10-13, paragraphs 32-38.

[12] 11 U.S.C. §108. Extension of time. [See Appendix]

1997, within which to file an action to perfect any claims which had existed at the time of the filing for bankruptcy by CalAg. So at the onset of the bankruptcy, CalAg had at least two years within which to file an action for inverse condemnation, against the defendant City of San Jose.

As for the Petitioners in this action, they were prevented from perfecting their claims against CalAg, during the entire period that CalAg was in bankruptcy, March 14, 1995 until July 31, 2000. In this same period, the defendant City of San Jose continued to enact Geologic Ordinances which destroyed the value of the Lower Suncrest Property. According to the DECLARATION OF MARGO LASKOWSKA IN REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT CITY OF SAN JOSE'S MOTION OF SUMMARY JUDGMENT, the city enacted five separate Geologic Ordinances starting with 24680, as follows: 1) Ordinance No.24680, dated August 23, 1994, 2) Ordinance No. 25015, dated December 5, 1995, 3) Ordinance No. 25159, dated August 27, 1996, 4) Ordinance No. 25369, dated June 10, 1997 and 5) Ordinance No. 25710, dated November 3, 1998[13]. In this same general time period, the market value of the Lower Suncrest Property was reduced from a value of Ten Million Dollars, to a diminished value where the property was bought at a Sheriff's Sale October 21, 1998 for a credit bid of $1,000.00 and ultimately to a value where at a tax sale in May of 2001 the property was sold for $90,000.00. Under the same code section as listed above, 11 U.S.C. §108(c)(2), the Petitioners claim that they are entitled to a tolling of the Statute of Limitations to their

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[13] A Negative Declaration relating to Ordinance No. 25710, under California Environmental Laws had previously been filed May 13, 1998.

bringing a Creditor Suit against the defendant City of San Jose pursuant to C.C.P. §708.210, et seq. The defendant City of San Jose has argued that the Petitioners never perfected their claims against defendant CalAg to Judgments. It is true that Petitioners Spangenberg, Gunn and Niland to date have only perfected a Judgment against James J. Macredes. This of course is because no actions could be brought against or maintained against CalAg while the bankruptcy was in effect. This same bankruptcy did not prevent the defendant City of San Jose from enacting Regulations which diminished the value of the Lower Suncrest Property which was the security which induced the Petitioners to make an investment which resulted in the claims of Petitioners Spangenberg, Gunn and Niland. In the case of plaintiff Nchekwube, his attempts to collect his claim against CalAg, were completely thwarted by the Automatic Stay in CalAg's ongoing bankruptcy the same as his fellow Petitioners. As such all the Petitioners herein contend that the defendant City of San Jose's regulations which diminished the Market Value for the Lower Suncrest Property, which was the security for each of their investments, could be said to have destroyed the Petitioners investment backed expectations. To date, the Petitioners contend that they have been denied their right to procedural and substantive due process, and equal protection as guaranteed under the Fifth and Fourteenth Amendment to the Constitution of the United States.

III. THE NINTH CIRCUIT HAS DECIDED IMPORTANT FEDERAL QUESTIONS WHICH CONFLICTS WITH A DECISION OF THE FOURTH CIRCUIT, AND CONFLICTS IN PRINCIPAL, IF NOT DIRECTLY, WITH

RELEVANT DECISIONS OF THIS COURT.

The Petitioners contend that the Ninth Circuit misunderstood the facts of the case, claiming that the Petitioners had not brought claims directly under the Constitution, and thereby waived the right to raise the issue on appeal. The record in the district court shows that the Petitioners had brought claims directly under the Constitution, and that they had also argued these claims in their brief in the district court.[14] This misunderstanding was pointed out to the Ninth Circuit panel, in a Petition for Rehearing, but the Ninth Circuit panel declined to rehear the matter. The issue of bringing Taking Claims directly under the Constitution is extremely important. The Ninth Circuit in Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704 (9th Cir. 1992) [Cert Denied 506 U.S. 1081] held that claims for violation of constitutional rights must be brought under the Civil Rights Act, 42 U.S.C. §1983. This holding is directly in conflict with the holding of the Fourth Circuit in Lawyer v. Hilton Head Pub. Svc. Dist. 1, 220 F.3d 298 (4th Cir. 2000). The Petitioners' position is best expressed by footnote *4* in the decision of the Fourth Circuit in Lawyer v. Hilton Head Pub. Svc. Dist. 1, supra.

> "n4 As noted in Section I, the Petitioners allege a claim for damages under the Takings Clause that is distinct from their § 1983 claim. Courts have struggled with the issue of whether Appellants can bring direct claims under the Takings Clause, or,

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[14] CFR, ¶¶s 42-47 & Brief [District Court Civil Docket #33]

instead, whether Appellants must use § 1983 as the mechanism for alleging a violation of the Takings Clause. In First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987), the Supreme Court stated that "it has been established at least since Jacobs v. United States, 290 U.S. 13, 78 L. Ed. 142, 54 S. Ct. 26 (1933), that claims for just compensation are grounded in the Constitution itself." 482 U.S. at 315. The Court also stated:

> The cases cited in the text, we think, refute the argument of the United States that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.

Id. at 316 n.9 (citation omitted); see also Mann v. Haigh, 120 F.3d 34, 37 (4th Cir. 1997) (citing First English for the proposition that the Takings Clause is a "situation in which the Constitution itself authorizes suit against the federal government"). Other courts, however, have held, in apparent conflict with First English, that a violation of the Takings Clause can only be redressed through a claim under § 1983. See, e.g., Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992) (Azul II) (holding that a plaintiff alleging a violation of the Takings Clause "has no cause of action directly under the United

States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983"); cf. Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575, 586 (9th Cir. 1991) (Azul I) (withdrawn by Azul II) (holding that under the Takings Clause, "the Constitution itself provides both the cause of action and the remedy"); see also Quality Refrigerated Servs., Inc. v. City of Spencer, 908 F. Supp. 1471, 1487 n.9 (N.D. Iowa 1995) (stating that dismissing the plaintiff's Takings Clause claim was proper because "there is simply no direct cause of action arising under the Constitution itself against municipal officials for alleged constitutional violations"). We assume for purposes of this case that Appellants can bring direct claims under the Takings Clause." Lawyer v. Hilton Head Pub. Svc. Dist. 1, supra at page 303.

The District Court in this matter determined that facial takings claims arising under the U.S. Constitution must be brought under 42 U.S.C. §1983, citing Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704 (9th Cir. 1992). The District Court then went on to determine that the applicable Statute of Limitations under 42 U.S.C. §1983, was one year citing Perez v. Severs, 869 F.2d 425 (9th Cir. 1989). [ORD, Page 11, See Appendix C][15]

Having claimed the right to bring a claim directly

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[15]ORD: ORDER DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND UNDER THE STATUTE OF LIMITATIONS, filed January 30, 2002. [District Court Civil Docket #37]

under the U.S. Constitution, Petitioners also claim that the appropriate Statute of Limitations is not one year as determined by the District Court, but rather three or five years. Under California law the Statue of Limitations for Inverse Condemnation is three years C.C.P. §338 (j). But when one considers the United States Supreme Court's decision in Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992), that all takings that destroy all property value require compensation, the five year statute of adverse possession is arguably the correct Statute of Limitations. C.C.P. §318, 319, 321 & 322.

Historically the applicable Statute of Limitations of the Civil Rights Act, 42 U.S.C. §1983, and inverse condemnation cases have evolved over time. In 1986, the Ninth Circuit wrote in a footnote "Under California law, inverse condemnation claims on the taking of private property are subject to a five year statute of limitations." McMillan v. Goleta Water District, 792 F.2d 1453, 1459 (9th Cir. 1986) fn5. See also Frustuck v. City of Fairfax, (1963) 212 Cal.App.2d 345, 373-374. Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962) held that actions brought under 42 U.S.C. §1983, had a statue of limitations of three years. With the decision Wilson v. Garcia, (1985) 471 U.S. 261, 105 S.Ct. 1938, the Statue of Limitations for actions under 42 U.S.C. §1983, became one year. See McMillan v. Goleta Water District, supra at 1456. In 1991, the Ninth Circuit stated that " We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. §1983." Azul-Pacifico, Inc. v. City of Los Angeles, (1992) supra at 704, which is the statute of limitations that the District Court used.

A second consideration is when does the Statute of Limitations begin to run. A property owner is of course not required to resort to piecemeal litigation or otherwise unfair

procedures in order to obtain this determination. MacDonald, Sommers, & Frates v. County of Yolo, et al., 477 U.S. 340, 351, (1986). United States v. Dickinson, 331 U.S. 745, 749, (1947).

IV. THE DECISION OF THE NINTH CIRCUIT IS INCORRECT

A. BANKRUPTCY LAW TOLLS THE STATUTE OF LIMITATIONS ON BRINGING AN ACTION.

Under their Creditor Theory, the Petitioners, contend that even under the stringent requirements of the Ninth Circuit in Azul-Pacific, Inc. v. City of Los Angeles, 973 F. 2d 704 (9th Cir. 1992), of a one year Statute of Limitations, because of the tolling effect of 11 U.S.C. §108, the Petitioners claim their Creditor Suits are timely.

Under California Law, Judgment Creditors are entitled to bring an action in the event that a third party is indebted to a Judgment Debtor C.C.P. §708.210, et seq.[16] In this particular matter the Petitioners Spangenberg, Niland, Gunn and Nchekwube were precluded from pursuing a creditor suit because CalAg had filed for bankruptcy March 14, 1995 and an Automatic Stay remained in effect pursuant to 11 U.S.C.§362, until the bankruptcy terminated July 31, 2000. The Petitioners remind the court that they filed this lawsuit August 28, 2000, less than thirty days after the termination of the CalAg bankruptcy. Petitioners contend that as Creditors, they were precluded from otherwise

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[16]C.C.P.§708.210, et seq. [See Appendix]

available relief by virtue of the Automatic Stay in bankruptcy. As such, the Petitioners contend that they were denied both substantive and procedural due process under the Fifth and Fourteenth Amendments of the United States Constitution, and are also entitled to relief under the Civil Rights Act, 42 U.S.C. §1983. In effect the federal bankruptcy law prevented the Petitioners from obtaining relief, while at the same time, the defendant City of San Jose continued to do acts which had the effect of destroying the value of the Lower Suncrest Property upon which the Petitioners would have had a lien and could have enforced it, were it not for the ongoing bankruptcy.

As described previously, also contained within the bankruptcy code is a provision for time extension codified in 11 U.S.C. §108 [17]. Petitioners contend that 11 U.S.C. §108 (c)(2) applies in this particular case. Since 1995 the Petitioners have been precluded from pursuing a claim of any kind including a Creditor lawsuit pursuant to C.C.P. §708.210, et seq., by the Automatic Stay in bankruptcy 11 U.S. §362. But subsequent to the termination of the bankruptcy on July 31, 2000, the Petitioners filed this action on August 28, 2000, less than thirty days after the termination of the bankruptcy. As such, they contend that any statue of limitations relating to any claims in the Creditor lawsuit pursuant to C.C.P. §708.210, et seq. have been tolled.

Because the Petitioners have had the value of their security destroyed by the actions of the City of San Jose, they contend that they have been denied procedural and substantive Due Process, and Equal Protection, and have been subjected to a wrongful taking of their property interest in Violation of the Fifth and Fourteenth Amendments to the

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[17] 11 U.S.C. §108. [See Appendix]

Constitution of the United States, and are entitled to recover damages for this taking. Armstrong v. U.S. 364 U.S. 40 (1960) (Government's complete destruction of a materialman's lien in certain property held a "taking".) See also Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 2002 U.S. LEXIS 3028, [535 U.S. ___, Part 2], generally & fn 27 (2002).

B. CLAIMS FOR JUST COMPENSATION MAY BE BROUGHT DIRECTLY UNDER THE CONSTITUTION.

The Ninth Circuit appears to be in direct conflict with the Fourth Circuit[18] and the United States Supreme Court on the issue of whether claims for Just Compensation can be brought directly under the Constitution. In the District Court, Petitioners brought claims for Just Compensation directly under the Fifth and Fourteenth Amendments to the Constitution, and argued the right to do so both in the District Court and then in the Ninth Circuit Court of Appeals. Petitioners contend that claims for Just Compensation can be brought directly under the Constitution, and that the appropriate Statute of Limitations should be either three or five years under California Law. As this case was filed August 28, 2000, a three year Statute of Limitations would allow a claim by CalAg (or by Petitioners as assignees) for a total destruction of value first evidenced with triggering event being the Sheriff's Sale on October 19, 1998, wherein the Lower Suncrest Property which had a value of Ten Million Dollars in March, 1994 and November

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[18] See Lawyer v. Hilton Head Pub. Svc. Dist. 1, supra

1996[19] was reduced to essentially zero value. It is this total destruction of value which the Petitioners contend that he obligates the payment of Just Compensation by the Respondent City of San Jose to CalAg, or in this case the Petitioners as assignees of the Chapter Seven Trustee in bankruptcy. Lucas v. South Carolina Coastal Commission, supra. Armstrong v. U.S., supra.

CONCLUSION.

In this action it is clear that the defendant City of San Jose, has "taken" property interest in the Lower Suncrest Property, belonging to the Petitioners without "just compensation" . The Petitioners have standing to bring this action under two different theories, as Judgment Creditors and as Assignees of the Chapter Seven Trustee, and are entitled to recover under both theories. The Petitioners have demonstrated by declaration, and the evidentiary facts show that there has been a complete destruction of the value of the Lower Suncrest Property, resulting in a taking of property without "just compensation" by the defendant City of San Jose, entitling the Petitioners to compensation. In addition, the evidence also demonstrates that an interim "taking" of property has occurred without "just compensation", also entitling the Petitioners to monetary relief. The Petitioners also made a showing that additional discovery was warranted, which was denied.

As Judgment Creditors, the Petitioners have shown that they were prevented from bringing a claim by the Automatic Stay in Bankruptcy, 11 U.S.C. §362, and that once the Automatic Stay was lifted by the termination of the

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[19] See footnote 4.

bankruptcy on July 31, 2000, the Petitioners timely filed their claims within thirty days as prescribed by statute 11 U.S.C. §108, by filing a complaint in the District Court on August 28, 2000. Therefore the petitioners contend that the Statute of Limitations have been tolled, and their claim should be allowed to proceed. As described above, the decision of the Ninth Circuit conflicts with three previous decisions of the Ninth Circuit[20] relating to the tolling provision of the bankruptcy code, 11 U.S.C.§108.

As Assignees of the Chapter Seven Trustee for the CalAg bankruptcy, the District Court determined that the Petitioners were barred by the Statute of Limitations, court citing Azul-Pacifico, Inc. v. City of Los Angeles, supra, which was affirmed by the Ninth Circuit. Petitioners contend that they have properly brought claims directly under the Constitution, and that therefore the Statute of Limitations is either three of five years. In either event the claims of the Petitioners are not barred by the one year Statute of Limitations as determined by the District Court. In support of their position, Petitioners have cited Lawyer v. Hilton Head Pub. Svc. Dist. 1, supra, wherein the Fourth Circuit criticizes the Ninth Circuit holding in Azul-Pacifico, Inc. v. City of Los Angeles, supra and suggests that it is apparently in conflict with prior holdings of the United States Supreme Court, relating to whether claims can be brought directly under the U.S. Constitution.

There are compelling reasons why the Supreme Court should take this case. Multiple issues of federal law embodied in this case are currently unsettled. These issues include: Whether bankruptcy law tolls the Statute of Limitations while a stay in bankruptcy prevents a party from

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[20]See footnote 10.

asserting a claim which would otherwise be available but for the stay in bankruptcy? 11 U.S.C. §108. Can a claim for just compensation be brought directly under the U.S. Constitution, or must such a claim be brought under the Civil Rights Act? 42 U.S.C. §1983. (Different interpretations can markedly affect the outcome of claims for just compensation. On this issue, decisions the Fourth and the Ninth Circuit are in conflict.[21]) Has Equal Protection been denied, when a City takes property from a party in bankruptcy, while creditors in the same bankruptcy are prevented from filing claims to prevent such a taking? Does the destruction of a Lien constitute a taking in violation of the Fifth and Fourteenth Amendments to the Constitution, or the Civil Rights Act, 42 U.S.C. §1983, requiring just compensation? Is the statute of limitations for a claim under the U.S. Constitution, or the Civil Rights Act governed by state or federal law? These issues need to be resolved.

Therefore, the Supreme Court should grant this Petition for Writ of Certiorari in order to resolve the existing conflict between the Fourth and Ninth Circuit, and settle other important issues of federal law.

Respectfully Submitted,

Counsel for Petitioners

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[21] Lawyer v. Hilton Head Pub. Svc. Dist. 1, supra.

APPENDIX. WRIT FOR CERTIORARI

APPENDIX A
NINTH CIRCUIT COURT OF APPEALS ORDER DENYING REQUEST FOR REHEARING, JUNE 3, 2003.

Filed June 3, 2003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD J. NILAND; JOHN B. GUNN; EMEKA NCHEKWUBE: ERIC KARL SPANGENBERG,	No. 02-15352
Plaintiffs - Appellants	D.C. No. CV-00-20902-RMW Northern District of California
v.	ORDER
CITY OF SAN JOSE, California, a municipal corporation; CALIFORNIA AGRICULTURE AND FOREST PRODUCTS CORP,	
Defendants - Appellees.	

Before: FERGUSON, McKEOWN, and RAWLINSON, Circuit Judges.

The panel has voted to deny Appellants' Petition for Rehearing.

Appellants' Petition for Rehearing filed on May 8, 2003, is DENIED.

APPENDIX B
NINTH CIRCUIT COURT OF APPEALS DECISION, APRIL 25, 2003

NOT FOR PUBLICATION

Filed April 25, 2003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD J. NILAND; JOHN B. GUNN; EMEKA NCHEKWUBE: ERIC KARL SPANGENBERG,	)	MEMORANDUM*
	)	No. 02-15352
	)	D.C. No. CV-00-20902-RMW
Plaintiffs - Appellants	)	
v.	)	
CITY OF SAN JOSE, California, a municipal corporation; CALIFORNIA AGRICULTURE AND	)	

FOREST PRODUCTS CORP,)
)
Defendants - Appellees.)
)

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted April 7, 2003
San Francisco, California

Before: FERGUSON, McKEOWN, and RAWLINSON, Circuit Judges.

1. Appellants have no standing to proceed in this action as judgment creditors of CalAg because Appellants do not have a judgment against CalAg. *See*

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* This Disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[PAGE 2]

Cal. Civ. Code § 210.780.Appellants' "de facto" creditor argument is not supported by precedent. Appellants do have standing as assignees.

2. Appellants' as applied claims are not ripe for review because CalAg neither completed an application to develop the property nor applied for a variance. *See Kinzili v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987). CalAg's failure to complete an application also dooms Appellants' futility argument. *See id.*

3. Any Facial challenge to the enactments is barred by the statute of limitations. [fn1]*See Levald, Inc. V. City of*

fn 1. We expressly decline to decide whether California's 90-day statute of limitations governing actions challenging land use decisions or the California one year statute of limitations applicable to 42 U.S.C. § 1983 claims applies to this case. Even assuming application of the later, Appellants' claims are still time barred. We also decline to entertain Appellants' contention that their claim arises directly under the Constitution. Because Appellants did not assert this argument before the district court, they have waived it for purposes of this appeal. *See Doi v. Halekulani Corp.*, 276 F. 3d 1131, 1140 (9th Cir. 2002).
[PAGE]3
4. The district court did not abuse its discretion in denying Appellants' Rule 56(f) request because the information sought pertained not at all to the arguments raises in the motion for summary judgment . *See Jarrow Formula, Inc. V. Nutrition Now, Inc.*, 304 F. 3d 829, 842 (9th Cir. 2002)
AFFIRMED
[Ed Note: PAGE 2, LINE 1. It should be. 708.210]

APPENDIX C

DISTRICT COURT'S ORDER DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND UNDER THE STATUTE OF LIMITATIONS.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SPANGENBERG, et al.,	)	No. C-00-20902 RMW
Plaintiffs,	)	ORDER DISMISSING ACTION FOR LACK OF SUBJECT MATTER JURISDICTION AND UNDER THE STATUTE OF LIMITATIONS
V.	)	
CITY OF SAN JOSE, et al.,	)	
Defendants.	)	[Re Docket Nos. 23, 44]

This is a takings action. Plaintiffs allege that two regulations enacted by defendant City of San Jose ("the City")-the 2020 General Plan and the Geological Hazard Ordinance- effected an unconstitutional taking of certain land known as the Lower Suncrest Property. The City's summary judgment motion seeking to dismiss plaintiffs' claims as unripe was heard on December 14, 2001. Because the court finds that it lacks subject matter jurisdiction over this action and that the statute of limitations bars plaintiffs' claims, this action is dismissed.

I. BACKGROUND

In December 1985, defendant California Agriculture and Forest Products Corp. ("Cal Ag") acquired title to 36 acres of land referred to as the "Lower Suncrest Property." In August 1998, Cal Ag entered into an Option and Purchase

agreement with Davidon Homes regarding the Lower Suncrest property, as well as 52 acres of additional land. Thereafter, Davidon Homes submitted an application
[PAGE 2]
to the City of San Jose for the development of the Lower Suncrest Property and the additional land. Before the application process was completed, however, Cal Ag and Davidon Homes became involved in a legal dispute, whereby Cal Ag was adjudged to have title to the Lower Suncrest Property, and Davidon Homes was adjudged to have title to the additional land. The application for development of the properties was never acted on by the City.

In August 1994, the City of San Jose enacted the 2020 General Plan and enacted amendments to its Geologic Hazard Ordinance. The 2020 General Plan reduced the development potential of the Lower Suncrest Property from a total of 72 residential units to 7 units. The amendments to the Geologic Hazard Ordinance deemed the Lower Suncrest Property to be underlain by a landslide, unless demonstrated to the contrary.

On March 14, 1995, Cal Ag filed for chapter 11 bankruptcy. Cal Ag's listed assets consisted of a residential home (nominal value) and the Lower Suncrest Property, valued at $10 million. Plaintiffs filed claims in that proceeding as unsecured creditors. As a result of the bankruptcy, Davidon Homes acquired title to the Lower Suncrest Property for $1,000 (subject to $700,000 in back taxes), and plaintiffs were assigned "the estate's interest in any and all claims the estate may have against the City of San Jose." (Spangenberg Decl. Ex. T.) When Davidon Homes did not pay the taxes owed on the Lower Suncrest Property, it was sold to a third party in a tax sale on May 2, 2001 for $90,000.

Plaintiffs assert in this action that they are judgment

creditors against Cal Ag based on the following facts. On September 8, 1995, plaintiffs each secured a default judgment against James M. Macredes in California Superior Court. Plaintiffs also secured judgments against Mr. Macredes and a company called "U.S. Agriculture, Inc." on January 25, 1996. (See Spangenberg Decl. Ex. N.) Furthermore, in a lawsuit filed by Davidon Homes against Cal Ag and Mr. Macredes (See Spangenberg, Decl. Ex. F), Cal Ag was adjudged to be the "alter ego" of Mr. Macredes.

On August 28, 2000, plaintiffs filed the complaint in this action alleging the following causes of action: (1) violation of plaintiffs' civil rights under 42 U.S.C. § 1983 by virtue of an unlawful taking, of property rights without just compensation; (2) violation of Fifth Amendment due process rights by virtue of an unlawful taking of property rights without just compensation; (3) violation of Fourteenth Amendment due process rights and equal protection under the law by virtue of an unlawful

[PAGE 3]

taking of property rights without just compensation; and (4) violation of the California Constitution, article I, § 19 (Inverse Condemnation) by virtue of an unlawful taking of property rights without just compensation. (See Compl. ¶¶ 40,43,46,49.)

The City seeks summary judgment that plaintiffs' takings claims are unripe because plaintiffs have not obtained a final administrative decision from the City regarding the application of the 2020 General Plan to the subject property, and further because plaintiffs have not sought compensation in state court. The City also seeks summary judgment that 42 U.S.C. § 1983 is the exclusive vehicle for pursuing takings claims in federal court, thus warranting dismissal of plaintiffs' federal and state constitutional claims.

In opposition, plaintiffs argue that they have standing to, bring this action either a judgment creditor against Cal Ag or as an assignee of Cal Ag's rights against the City. (Opp. at 8.) Under each theory, plaintiffs claim that several exceptions to the ripeness requirements relieve them from first obtaining a final administrative decision from the City and from first seeking state compensation. Additionally, plaintiffs request continuance of the hearing on the City's motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure so that they may take additional discovery to oppose the motion.

The City addresses these arguments in reply, and further argues that plaintiffs' claims are barred by the statute of limitations.

II. ANALYSIS

A. Standing

Preliminarily, the court addresses the issue of plaintiffs' standing to bring this action against the City of San Jose. See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, 273 F.3d 1229,1235 (9th Cir. 2001) ("[F]ederal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines.") (internal quotations omitted)). Plaintiffs assert that they have standing to bring this suit against the City under two independent theories: (1) as a judgment creditor of Cal Ag; and (2) as an assignee of Cal Ag's right to bring suit against the City. (See Opp. at 8-9.) The court finds that plaintiffs lack standing under a judgment creditor theory but that they do have standing under an assignee theory.

[PAGE 4]

Under plaintiffs' judgment creditor theory, plaintiffs assert that they are judgment creditors of Cal Ag and that the City is a "third person" within the meaning of California Code of Civil Procedure § 708.210, which provides:

If a third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor, the judgment creditor may bring an action against the third person to have the interest or debt applied to the satisfaction of the money judgment.

Cal. Code Civ. P. 708.210; see Opp. at 8:10-16, 11:16-17.

Plaintiffs have not established that section 708.210 applies in this case, First, plaintiffs have not provided any evidence establishing that Cal Ag is a judgment debtor to them. The only evidence plaintiffs submit in support of this contention are purported judgments against James M. Macredes dated September 8, 1995, and purported judgments against Mr. Macredes and U.S. Agriculture, Inc. dated January 25, 1996. (See Spangenberg Decl. Ex. N.) At the September 8, 1995 hearing, plaintiffs expressly indicated that "the matter is proceeding as to Defendant James M. Macredes only and Defendant California Agriculture and Forest have [sic] filed for bankruptcy." (id.) Furthermore, the captions in the superior court proceedings indicate that Cal Ag and U.S. Agriculture, Inc. are separate entities. (See id.) Accordingly, there is no evidence showing that plaintiffs ever secured a judgment against Cal Ag.

Moreover, it does not appear that plaintiffs have sought to amend the judgments purportedly secured against Mr. Macredes and U.S. Agriculture Inc. to name Cal Ag as an additional Judgment debtor. See, e.g., Fed. R. Civ. P. 59(e); Fed. R. Civ. P. 69(a). Although plaintiffs provide evidence suggesting that Cal Ag has been adjudged to be the "alter ego" of Mr. Macredes in a lawsuit filed by Davidon Homes (See Spangenberg Decl. Ex. F), even if true, that showing alone would not render Cal Ag a judgment debtor to plaintiffs. Rather, evidence of alter ego status is merely one factor to be considered in deciding whether a judgment

should be amended to name an additional party as a judgment debtor. See In re Levander, 180 F.3d 1114, 1120-21 (9th Cir. 1999). Therefore, because a judgment-creditor/judgment-debtor relationship has never been established between plaintiffs and Cal Ag, § 708.210 is inapplicable.

[PAGE 5]

Moreover, even if plaintiffs had properly amended the purported judgments against Mr. Macredes and U.S. Agriculture Inc. to include Cal Ag as a judgment debtor, it nevertheless appears that the requirements of § 708.210 still have not been satisfied. Plaintiffs have not shown, for instance, that the City "has possession or control of property" in which Cal Ag has an interest. In fact, the Lower Suncrest Property apparently was sold at a tax sale to a third party on May 2, 2001, thus precluding a finding that the City has possession or control of that property or that Cal Ag has an interest in that property. (See Opp. at 8:6-7.) Furthermore, plaintiffs have not shown that the City is indebted to Cal Ag. Although plaintiffs were assigned the right to pursue any claims Cal Ag might have against the City (see Spangenberg Decl. Ex. T), plaintiffs have not shown that any of those claims have been adjudicated such that the City can be deemed "indebted" to Cal Ag.

Accordingly, the court finds that plaintiffs lack standing to bring suit against the City under a judgment creditor theory. Because plaintiffs appear to have standing as an assignee of Cal Ag's claims against the City, however, the court will now address the merits of the City's motion.

B. Plaintiffs' Takings Claims

It is unclear from the complaint whether plaintiffs are mounting an as-applied challenge to the City's regulations or a facial challenge to the regulations. The court does not need to resolve this distinction, however, in deciding the present

motion. To the extent plaintiffs are making an as-applied challenge to the City's regulations, that claim is unripe for failure to satisfy the first prong of the Williams v. Taylor ripeness test, discussed below. To the extent plaintiffs are making a facial challenge to the regulations, that claim is barred by the statute of limitations.

1. As-Applied Takings Claim: Ripeness

The primary issue raised by the City's summary judgment motion is whether plaintiffs took the necessary procedural steps before filing this lawsuit to render their takings claim ripe for adjudication. (See Mot. at 5-10.) Resolution of this issue is critical in that a challenge for lack of ripeness is a challenge to this court's subject matter jurisdiction. See Haw. Newspaper Agency v. Bronster, 103 F.3d 742, 746 (9th Cir. 1996) (citing Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375, 377 (9th Cir. 1988) ("The question of ripeness goes to our subject matter jurisdiction to hear the case.")). The court finds that plaintiffs' as-applied takings claims are not ripe.
[PAGE 6]

The Supreme Court, in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1983), set forth a two-pronged ripeness test for as-applied takings claims brought in federal court under § 1983:

> [A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.
>
> ***
>
> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so.

473 U.S. at 186, 194.

As discussed below, plaintiffs have not satisfied the first prong of the Williamson County test, known as the "final administrative decision" prong, rendering unnecessary consideration of the "state compensation" prong.

a. Final Administrative Decision

In order to satisfy the "final administrative decision" prong of the Williamson County test, the Supreme Court explained that a plaintiff must have submitted a development plan for its particular property, and applied for, and been denied, a variance from the regulation. See id. at 187-94; see also id. at 191 n.12 ("[I]t is impossible to determine the extent of the loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations."). The Ninth Circuit reaffirmed these requirements in Kinzli v. City of Santa Cruz, 818 F.2d 1449 (9th Cir. 1987),

> In [Williamson County, the Supreme Court not only set forth the requirement that the plaintiff must first have submitted a development plan which was rejected, but also explained that the plaintiff must seek variances which would permit uses not allowed under the regulations. Therefore, the "final decision" which inflicts a concrete injury on the plaintiff and is ripe for adjudication as a claim of a regulatory taking, even if brought under 42 U.S.C. § 1983, requires at least two decisions against the Kinzlis: (1) a rejected development plan, and (2) a denial of a variance.

818 F.2d at 1453-54.

Here, the City has not rejected a development plan or denied a variance submitted by plaintiffs or by Cal Ag under

the City's regulations. Although plaintiffs claim that Davidon Homes previously submitted a plan for the development of the Lower Suncrest Property, that plan was submitted in 1988, six years before the regulations at issue were enacted. (See Compl. ¶¶ 11-12, 14.) Likewise, plaintiffs
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claim that Cal Ag submitted a plan in November 1989. (See Spangenberg Decl. Ex. C.) The Williamson County test requires the City to have reached a final decision "regarding the application of the regulations to the property at issue." 473 U.S. at 186. Plans submitted five and six years before the regulations were enacted do not meet this requirement. Furthermore, in January 1992, still two and a half years before the regulations at issue were enacted, a state court judgment transferred title to the Lower Suncrest Property from Davidon Homes to Cal Ag. (See Spangenberg Ex. E.) There is no evidence that the City ever made a final decision regarding the plan submitted by Davidon Homes, or that Cal Ag, upon acquiring title to the property, submitted a new plan for the City's approval or sought a variance at any time, let alone after the regulations at issue here were enacted. (See Crabtree Decl. ¶¶ 6-7.) In short, there is no evidence that the City ever rendered, a final administrative decision with respect to the Lower Suncrest Property. Therefore, absent an exception to this requirement, plaintiffs' as-applied takings claims are unripe.

i. Futility Exception

Plaintiffs argue that a number of exceptions to the ripeness requirements apply in this case. (See Opp. at 14-17.) The court disagrees.

Plaintiffs argue that they did not need to secure a final administrative decision from the City prior to filing this lawsuit, because it would have been futile for Cal Ag or any

developer to submit plans for development of the Lower Suncrest Property. (See Opp. at 14.) As evidence of futility, plaintiffs argue that the 2020 General Plan "clearly reduced the value of the subject property, until it had essentially no value." (Opp. at 14:13-17.)

Plaintiffs' argument is unpersuasive. The Ninth Circuit, in Kinzli, explained that, in determining, futility, it is improper to inquire into a regulation's negative economic impact on the subject property:

> We reject the . . . view that futility may be determined, absent any rejected development plan, by inquiring whether any beneficial use remains or whether the regulatory regime inhibits the property's marketability. Adoption of such standard would require courts to speculate as to what potential uses may be lurking in the hopes of the property owner and in the minds of developers and city planners. This would result in the same sort of speculation that the ripeness doctrine prohibits.

818 F.2d at 1454. Plaintiffs here seek to establish futility in the very manner that the Kinzli court rejected, i.e., by arguing that the City's regulations inhibit the Lower Suncrest Property's marketability.

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In accordance with Kinzli, this court cannot engage in the speculation necessary to adopt plaintiffs' argument.

ii. Exception for § 1983 cases

Plaintiffs additionally argue that the Ninth Circuit recognizes numerous additional exceptions to the "rather harsh" Williamson County requirements. (See Opp. at 15.) Plaintiffs cite Heath v. Cleary, 708 F.2d 1376, 1379 n.3 (9th Cir. 1983), for the proposition that "exhaustion of administrative remedies is not a prerequisite to bringing an

action under 42 U.S.C. § 1983." (Opp. at 15:16-18.) This argument misses the mark, however. As the Supreme Court explained in Williamson County:

> The question of whether administrative remedies must be exhausted is conceptually distinct ... from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

473 U.S. at 192-93.

Thus, the Supreme Court has considered and rejected the argument plaintiffs' make here.

iii. Procedural Due Process Exception

Additionally, plaintiffs argue that Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), "held that the rationale for requiring exhaustion of state compensation remedies in taking cases does not extend to a claim of the denial of procedural due process." (Opp. at 16-.14-16.) This argument, however, does not relate to the "final administrative decision" ripeness requirement. Rather, it relates to the second prong of the Williamson County ripeness test, namely, the "state compensation" prong. The Ninth Circuit in Sinaloa expressly clarified that a challenge to a regulation under the due process clause is still subject to

the "final administrative decision" ripeness requirement. See 882 F.2d at 1404 n.5 ("Williamson County's first exhaustion requirement . . . applies to all challenges to regulatory takings, whether based on the just compensation clause, the due process clause, the equal protection clause or the fourth amendment....."). Accordingly, Sinaloa does not recognize an exception to the first ripeness requirement, as plaintiffs claim. (See Opp. at 16:16-17.)

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Furthermore, it appears from the complaint that plaintiffs' purported "due process" claim nevertheless would be subject to the "state compensation" ripeness requirement. Plaintiffs' due process claim is more properly characterized as a "just compensation" claim in that they allege that they have been "deprived of property without due process of law, by virtue of an unlawful taking of progeny without just compensation." (Compl. ¶ 43 (emphasis added).) The Ninth Circuit in Sinaloa explained that the Williamson County state compensation ripeness requirement "derived from the special nature of the just Compensation Clause [which] states only that the just compensation clause cannot be violated until the state has subsequently declined to pay for the taking." 882 F.2d at 1404 (citation omitted). Because plaintiffs' second cause of action is based on an alleged taking of property "without just compensation," the rationale for imposing the "state compensation" ripeness requirement on takings claims would appear to apply here.

iv. Physical Invasion Exception

Finally, plaintiffs argue that Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986), "holds that the first prong of [sic, the] finality requirement does not apply in a case of physical invasion because the invasion, as a practical matter, is a final decision." (Opp. at 16-.17-19.) The complaint does not allege, however, that the City, or anyone

else, physically invaded the Lower Suncrest Property. See Levald, Inc. v. City of Palm Desert, 998 F.2d 680,684 (9th Cir. 1993) ("Takings claims are divided into two classes: permanent physical occupation claims and regulatory takings. A physical occupation occurs when the government physically intrudes upon private property either directly or by authorizing others to do so."). Rather, the complaint shows that plaintiffs' claims are based on an alleged regulatory taking. Accordingly, this exception is inapplicable in this case.

Thus, because none of the alleged "exceptions" to the Williamson County requirements cited by plaintiffs applies in this case, and because the court is unaware of any such exception, the court finds that plaintiffs' as-applied takings claims are unripe for failure to satisfy the "final administrative decision" requirement.

b. State Compensation

The City additionally argues that plaintiffs have failed to satisfy the second prong of the Williamson County ripeness test. (See Mot. at 9-10; reply at 7-9.) Specifically, the City argues that

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plaintiffs must seek compensation in state court before bringing an action in federal court. (See id.)[1] Because

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[1] The City is incorrect in arguing that plaintiffs must first bring an action in state court before seeking relief in federal court. The Ninth Circuit, in Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995), explained that a plaintiff can satisfy the "state compensation" requirement by raising its state claims initially in federal district court. 59 F.3d at 860 (conceding that the "ambiguous" language in Williamson County suggests that takings claims must first be

plaintiffs' as-applied takings claims are unripe under the "final administrative decision" prong of the Williamson County test, the court does not need to address the second ripeness requirement. See Kinzli, 818 F.2d at 1455 ("We need not ... reach the question of whether California procedures are adequate, because the [plaintiffs] failed to obtain final decisions denying their application for development and denying them a variance.").

2. Facial Challenge: Statute of Limitations

To the extent plaintiffs are making a facial challenge to the City's regulations, that claim is barred by the statute of limitations.

A facial challenge to a regulation involves a claim that the mere enactment of the regulation constitutes a taking, and requires showing that the challenged regulation either: (1) does not substantially advance legitimate state interests, or (2) denies an owner all economically viable use of his land. See Agins v. City of Tiburon, 100 S. Ct. 2138, 2141 (1980); Sinclair Oil Com. v. County of Santa Barbara, 96 F.3d 401, 406 (9th Cir. 1996). Under either rationale, a facial challenge to the City's regulations would be barred in this case.

a. "substantially advance legitimate state interests"

If a facial challenge to a regulation is brought on the ground that it does not substantially advance legitimate state interests, that claim is ripe immediately upon enactment of the regulation; neither of the Williamson County ripeness

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brought in state court). This point of law is of no consequence, however, given that plaintiffs' as-applied takings challenge is unripe under the "final administrative decision" prong.

requirements applies to such a claim. See San Remo Hotel v. City & County of San Francisco, 145 F.3d 1095, 1102 (9th Cir. 1998); Yee v. City of Escondido, 112 S. Ct. 1522, 1531-32 (1992). The statute of limitations for such a claim, therefore, begins to run immediately upon enactment of the regulation. See Norco Constr., Inc. v King County. 801 F.2d 1143, 1145 (9th Cir. 1986); Hensler v. City of Glendale. 876 P.2d 1043, 1056 (Cal. 1994).

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All federal takings claims brought under 42 U.S.C. § 1983[2] are subject to a one-year statute of limitations. See Cal. Civ. P. Code § 340(3); Perez v. Seevers, 869 F.2d 425, 426 (9th Cir. 1989) (per curiam)[3]. Facial takings claims brought under California law are subject to a 90-day statute of limitations. See Cal. Gov. Code § 65009; Hensler v. City

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[2]The Ninth Circuit has explained that takings claims arising under the U.S. Constitution must be brought under 42 U.S.C. § 1983. See Azul-Pacifico, Inc. v. City of Los Angeles, 973 F.2d 704, 705 (9th Cir. 1992). Therefore, federal constitutional takings claims are also subject to § 1983's statute of limitations.

[3] Section 1983 does not contain its own statute of limitations. Consequently, § 198') borrows the applicable statute of limitations for personal injury causes of action under state law. See Perez v. Seevers, 869 F.2d 425, 426 (9th Cir. 1989) (per curiam) (citing Wilson v. Garcia, 471 U.S. 261, 279-80 (1985)). A personal injury cause of action in California is subject to a one-year statute of limitations. See Cal. Civ. P. Code § 340(3); see also Perez, 869 F.2d at 426.

of Glendale, 876 P.2d 1043 (Cal. 1994).[4]

The City's 2020 General Plan was enacted on or about August 16, 1994 (Spangenberg Decl. Ex. G), and the Geological Hazard Ordinance was amended on or about August 23,1994 (See id. Ex. H). Accordingly, a facial challenge to either regulation brought under § 1983 must have been brought by August 1995. Similarly, a facial challenge brought under California state law must have been brought within 90 days of enactment, namely, by November 1994. Plaintiffs filed the present action on August 28, 2000, over five years after the § 1983 statute of limitations had ran and nearly six years after the state action statute of limitations had run. Accordingly, a facial challenge to the City's regulations on the ground that they fail to substantially advance legitimate state interests was barred as of August 1995.

b. "denies an owner all economically viable use of his land"

A facial challenge to a regulation brought on the ground that it denies an owner all economically viable use of his land involves a slightly different statute of limitations analysis, but such a challenge in this case nevertheless would be untimely.

Facial challenges based on the denial of economic use

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[4]The California Supreme Court, in Hensler v. City of Glendale, 876 P.2d 1043 (Cal. 1994), explained: "If the challenge is to the facial validity of a land-use regulation, the statute of limitations runs from the date the statute becomes effective. Government Code section 65009 establishes a 120-period of limitation for such actions." 876 P.2d at 1056 (emphasis added). Section 65009 was amended in 1995, however, reducing the period of limitation to 90 days.

of one's property, like "legitimate state interests" facial challenges, are not subject to the "final administrative decision" ripeness requirement. See Yee v. City of Escondido, 112 S. Ct. 1522, 1531-32 (1992). The Ninth Circuit has explained,

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however, that "denial of economic use" facial challenges are still subject to the "state compensation" ripeness requirement. See Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 407 (9th Cir. 1996); see S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 505-07 (9th Cir. 1990). As a result, § 1983's one-year statute of limitations period does not begin to run upon enactment of the regulation, but rather only after state compensation has been denied. See Levald, Inc. V. City of Palm Desert, 998 F.2d 680, 687 (9th Cir. 1993). The 90-day statute of limitations for facial takings challenges brought under California law, however, still begins to run upon enactment of the regulation, See Cal. Gov. Code § 65009; Hensler v. City of Glendale, 876 P.2d 1043, 1056 (Cal. 1994). Unlike a § 1983 claim, the state law claim, obviously, is not conditioned on first seeking compensation under state law.

Here, because a facial challenge to the City's regulations was not made with 90 days of their enactment, plaintiffs are time-barred from seeking state compensation for the alleged takings. This result raises the following peculiar issue: What effect does the expiration of the 90-day "state compensation" statute of limitations have on plaintiffs' ability to bring a takings claim in federal court under § 1983? Does that expiration render the § 1983 claim forever unripe for failure to satisfy the second prong of the Williamson County test? Or, alternatively, does it automatically ripen the § 1983 claim under the "futility" exception, on the ground that it would be futile to file a time-barred state claim for

compensation? Or, is the 90-day "state compensation" statute of limitations preempted by § 1983's one-year statute of limitations?

The Seventh Circuit addressed this issue in Gamble v. Eau Claire County, 5 F.3d 285 (7th Cir. 1993), holding that the failure to timely seek state compensation forfeited any claim based on the takings clause to just compensation, explaining:

> We cannot, it is true, find any case which says that failure to pursue state compensation remedies in timely fashion forfeits a federal claim to just compensation. The cases hold that the federal claim is unripe until state remedies are exhausted. But a claimant cannot be permitted to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open. As recognized in other areas where exhaustion of remedies is required, an unexcused failure to exhaust forfeits the plaintiff s rights ....

5 F.3d at 286.

The Supreme Court in Felder v. Casey, 108 S. Ct. 2302 (1988), however, did not go so far as to allow a state statute of limitations to effectively trump a federal statute of limitations. Felder involved

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an action originating in Wisconsin state court brought by the, petitioner against several police officers for alleged civil rights violations arising out of petitioner's arrest. At the time, Wisconsin had a notice of-claim statute providing that no action may be brought against any state governmental subdivision, agency, or officer unless the claimant provided

written notice of the claim within 120 days. Failure to comply with the 120-day period resulted in dismissal of the action. The Supreme Court held that the 120-day statute of limitations for filing a notice could not eviscerate the two-year statute of limitations available under § 1983, reasoning that Congress intended civil rights plaintiffs to have a sufficient period of time to file suit. See 108 S. Ct. at 2305.

The court need not resolve this issue here, however. Even under the most liberal application of the two statutes of limitations in this case, in which the 90-day period is tacked to the 1-year period under § 1983, any facial challenge to the City's regulations based on the denial of economically viable use of the Lower Suncrest Property would have been time-bared as of November 1995, nearly five years before plaintiffs filed the present action.

c. Tolling Unavailable

Further more, Cal Ag's ongoing bankruptcy proceedings from May 24, 1995 to July 31, 2000 would not toll the statute of limitations. Although a bankruptcy proceeding imposes an"automatic stay" on a creditor's ability to file suit against the debtor in bankruptcy, nothing in the bankruptcy code prevents the debtor from filing a lawsuit against a third party. See 11 U.S.C. § 362(a) (staying the commencement or continuation of actions "against the debtor"). As such, Cal Ag could have, but chose not to, pursue its claims against the City at any time during its bankruptcy proceedings. Consequently, the statute of limitations with respect to Cal Ag's potential claims continued to run while Cal Ag was involved in bankruptcy proceedings. Plaintiffs acknowledge that they "are entitled to seek recovery in the exact same manner as Cal Ag would be entitled to do" (Opp. at 8) and, therefore, are precluded from bringing a facial challenge to the City's regulations by the statute of limitations to the same extent.

Accordingly, to the extent plaintiffs are making a facial challenge to the City's regulations, either under a "legitimate state interests" theory or under a "denial of economic use" theory, that claim is barred by the statute of limitations and, therefore, dismissed with prejudice.
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C. Plaintiffs' Rule 56(f) Request for Additional Discovery

At the conclusion of their opposition brief, plaintiffs suggest that additional discovery is needed before the City's summary judgment motion can be decided. (See Opp. at 17-19.) Specifically, plaintiffs propose taking additional discovery to determine whether the City enacted the regulations at issue in order to preserve use of the Lower Suncrest Property for the benefit of the Santa Clara Water District. (See id.)

The court agrees with the City that plaintiffs' proposed additional discovery does not relate to the issues raised in the present motion, namely, whether this action is ripe for adjudication. (See Reply at 10-11.) At most, such discovery would be relevant to whether the City's regulations "substantially advance legitimate state interests." There is no suggestion in the complaint, however, that plaintiffs are making such a facial challenge, and in any event, as explained above, such a challenge is barred by the statute of limitations. Accordingly, the court declines plaintiffs' invitation to exercise its discretion to continue the hearing on the present motion so that plaintiffs can take additional discovery.

D. Dismissal

To the extent plaintiffs are making an as-applied takings challenge to the City's regulations, that claim is unripe and, therefore, dismissed without prejudice for lack of subject matter jurisdiction. See S. Pac. Transp.

Co. v. City of Los Angeles, 922 F.2d 498, 502 (9th Cir. 1990) ("If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed."). Furthermore, although the City has styled its motion as one for summary judgment, where jurisdiction is lacking, dismissal rather than summary judgment is appropriate. See Capitol Industries-EMI, Inc. v. Bennett, 681 F.2d 1107, 1118 (9th Cir. 1982) ("This Court has held ... that an order of dismissal, and not a Rule 56 motion for summary judgment, is the proper method for disposing of an action in which subject matter jurisdiction is lacking."). To the extent plaintiffs are making a facial takings challenge, that claim is dismissed with prejudice as untimely under the statute of limitations.

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III. ORDER

For the foregoing reasons, the court dismisses any alleged as-applied takings claims without prejudice for lack of subject matter jurisdiction, and dismisses any alleged facial takings claims with prejudice as barred by the statute of limitations.

DATED: 1/29/02 _____/s/_____
RONALD M. WHYTE
United States District Judge

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Copy of Order mailed on 1/30/02 to:

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APPENDIX D
JUDGMENT.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SPANGENBERG, et al., Plaintiffs,	)	No. C-00-20902 RMW
	)	JUDGMENT
V.	)	
CITY OF SAN JOSE, et al.,	)	

Defendants.)
_____)

On January 29, 2002, the court entered an order dismissing plaintiffs' as-applied taking claims without prejudice for lack of subject matter jurisdiction, and dismissing plaintiffs' facial taking claims with prejudice as barred by the statute of limitations.

Accordingly, judgment is hereby entered against plaintiffs in favor of defendants, and plaintiffs shall take nothing by way of their complaint.

DATED: 1/29/02 _____/s/_____
RONALD M. WHYTE
United States District Judge

[PAGE 2]
Copy of Judgment mailed on 1/30/02 to:

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APPENDIX E

TEXT OF STATUTORY PROVISIONS SPECIFIED IN THE "CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED" SECTION OF THIS PETITION.

1. U.S. Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in and criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. U. S. Constitution, Amendment Fourteen.

AMENDMENT XIV Passed by Congress June 13, 1866. Ratified July 9, 1868.
Note: Article I, section 2, of the Constitution was modified by section 2 of the 14th amendment.
Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.
Section 5.
The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
*Changed by section 1 of the 26th amendment.

3. Civil Rights Act. 42 U.S.C. § 1983

42 USC Sec. 1983
Sec. 1983. Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,
or immunities secured by the Constitution and laws, shall be liable
to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought
against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted
unless a declaratory decree was violated or declaratory relief

was
unavailable. For the purposes of this section, any Act of Congress
applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. 11 U.S.C. §108

11 U.S.C. §108. Extension of time.

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of -

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of -

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of -

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

5. California Constitution, Article 1, §19. Eminent Domain; just compensation; possession.

Sec. 19 Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by court to be the probable amount of just compensation.

6. CCP §§ 318, 319, 321 & 322.

CCP § 318. Five Years- Possessory Action.

No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or

grantor, was seized or possessed of the property in question, within five years before the commencement of the action.

CCP § 319. Title or Rents and Profits.

No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within five years before the commencement of the Act in respect to which such action is prosecuted or defense made.

CCP § 321. Adverse Possession --Five Years.

In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action.

CCP § 322. Entry Under Claim of Title --Extent of Presumptive Possession.

When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent Court, and that there has been a continued occupation and possession of the property included in such

instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that when it consist of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

7. CCP § 338. Three Years.

(j) An action to recover for physical damage to private property under Section 19 of Article I of the California Constitution.

8. Creditor Lawsuits. CCP §708.210-§708.290.

CCP § 708.210. Actions against third parties in possession or control of property or indebted to judgment debtor.

If a third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor, the judgment creditor may bring an action against the third person to have the interest or debt applied to the satisfaction of the money judgment.

. CCP § 708.220 Parties; venue.

The judgment debtor shall be joined in an action brought pursuant to this article but is not an indispensable party. The residence of the judgment debtor may not be considered in the determination of proper venue unless otherwise provided by contract between the judgment debtor and the third person.

CCP § 708.230. Limitations of actions .

(a) Except as provided in subdivision (b). An action shall be commenced pursuant to this article before the

expiration of the later of the following times:

(1) The time when the judgment debtor may bring an action against the person concerning the property or debt.

(2) One year after the creation of a lien on the property or debt pursuant to this title if the lien is created at the time when the judgment debtor may bring an action against the third person concerning the property or debt.

(b) An action may not be commenced pursuant to this article after the period for enforcement of the money judgment has expired.

(c) Notwithstanding Section 683.020, if an action is commenced pursuant to this article within the time permitted in this section, the action may be prosecuted to judgment.

CCP § 708.240.Temporary Injunctive Relief.

The judgment creditor may apply to the court in which an action under this article is pending for either or both of the following:(a) An order restraining the third person from transferring to the judgment debtor the property in which the judgment debtor is claimed to have an interest or from paying to the judgment debtor the alleged debt. The order shall be made on noticed motion if the court so directs or a court rule so requires. Otherwise, the order may be made on ex parte application. The order shall remain in effect until judgment is entered in the action or until such earlier time as the court may provide in the order. An undertaking may be required in the discretion of the court. The court may modify or vacate the order at any time with or without a hearing on such terms as are just.(b) A temporary restraining order or a preliminary injunction or both, restraining the third person from transferring to any person or otherwise disposing of the property in which the judgment debtor is claimed to have an interest, pursuant to Chapter 3 (commencing with section 525) of Title 7, and the court may

make, dissolve, and modify such orders as provided therein.

15. CCP § 708.250. Creation of Lien by Service of Summons

Service of summons on the third person creates a lien on the interest of the judgment debtor in the property or on the debt owed to the judgment debtor that is the subject of an action under this article.

16. CCP § 708.260. Claim of Exemption in Creditor's Suit.

(a) In an action brought pursuant to this article, the judgment debtor may claim that all or any portion of the property or debt is exempt from enforcement of a money judgment. The claim shall be made by application to the court on noticed motion, filed with the court and served on the judgment creditor not later than 30 days before the date set for trial. Service shall be made personally or by mail. The judgment debtor shall execute an affidavit in support of the application that includes all of the matters set forth in subdivision (b) of Section 703.520. No notice of opposition to the claim of exemption is required. If the judgment debtor has not been named as a party to the action, the judgment debtor may obtain an order under Section 389 that the judgment debtor be made a party. Except as provided in subdivision (b), failure of the judgment debtor to make a claim of exemption is a waiver of the exemption.(b) Failure of the judgment debtor to make a claim of exemption in an action brought pursuant to this article is not a waiver of the exemption if both of the following conditions are satisfied:(1) The judgment debtor has not been served with process in the action that contains a description of the property or debt reasonably adequate to permit it to be identified.(2) The judgment debtor does not have actual

notice of the pendency of the action and the identity of the property or the nature of the debt in issue.

CCP § 708.270. No Right to Jury Trial.

There is no right to a jury trial in an action under this article.

CCP § 708.280. Determinations to Be Made by Court in Creditor's Suit.

(a) The court shall determine any exemption claim made in the action. If the judgment debtor establishes to the satisfaction of the court that the property or debt is exempt from enforcement of a money judgment, the court shall so adjudge and may not make the orders referred to in subdivisions (b), (c), and (d).(b) If the judgment creditor establishes that the third person has property in which the judgment debtor has an interest or is indebted to the judgment debtor, the court shall render judgment accordingly. The property or debt may be applied to the satisfaction of the judgment creditor's judgment against the judgment debtor as ordered by the court.(c) If the court determines that the third person has property in which the judgment debtor has an interest, the court may order the third person not to transfer the property until it can be levied upon or otherwise applied to the satisfaction of the judgment.(d) If the court determines that the third person has transferred property that was subject to a lien in favor of the judgment creditor or, contrary to court order of which the third person has notice, has paid the debt to the judgment debtor or has transferred the property, the court shall render judgment against the third person in an amount equal to the lesser of the following:(1) The value of the judgment debtor's interest in the property or the amount of the debt.(2) The amount of the judgment creditor's judgment against the judgment debtor

remaining unsatisfied.

CCP § 708.290. Recovery of Costs Prohibited.

Costs incurred by or taxed against the judgment creditor in an action under this article may not be recovered from the judgment debtor as a cost of enforcing the judgment.